IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.198 OF 2006

IN

SUMMARY SUIT NO.38 OF 2006

Mrs.Mani Sarin ...Plaintiff

vs.

Pravin K. Trama ...Defendant.

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Mr.J.B.Patel, for Plaintiff.

Mr.Ajay Panicker, for Defendant.

**CORAM: D.K.DESHMUKH,J.**

**DATED: 14th August, 2006.**

**P.C.**:-

1. The suit of the plaintiff is based on the agreement entered into between the parties dated 30.3.2005. The plaintiff wanted to buy a flat at Hiranandani Gardens and therefore, she contacted the defendant. The parties agreed on the price of the flat at Rs.86,50,000/-, out of which Rs.5,00,000/-

was to be paid as earnest money. The balance amount was agreed to be paid on 30.4.2005. It is mentioned in the agreement that against this flat, the defendant has taken loan from the HDFC Bank and the defendant cannot transfer the property without obtaining no objection certificate from the HDFC Bank. Clause (9) of the agreement provides that if the defendant fails to transfer the property as per the agreement then apart from refunding of the earnest money the defendant would be liable to pay damages. The plaintiff applied for loan to ICICI Home Finance for making payment of balance amount of consideration. The plaintiff has produced the document dated 21.4.2005 which shows that the ICICI Home Finance has agreed to advance that amount to the plaintiff. The plaintiff has also produced on record one document dated 28.4.2005 from HDFC which shows that on 28.4.2005 an amount of Rs.43,24,587/- was due to HDFC from the defendant. On 29.4.2005 the plaintiff addressed a letter to the defendant pointing out that he is ready to pay the balance amount of Rs.81,50,000/-, but the defendant has not obtained No Objection Certificate from HDFC by

clearing the debt. The defendant has not responded to this letter. Then there were correspondence between the parties. Thereafter, the defendant has forfeited the amount of Rs.5,00,000/- as the plaintiff failed to pay the balance amount of consideration. The plaintiff has therefore, filed this suit for recovery of earnest money deposit of Rs.5,00,000/-.

2. The defence of the defendant is that there was no obligation on the defendant, as per the agreement between the parties, to complete the transaction by 30.4.2005. Therefore, the defendant was under no obligation to clear his title by making payment to HDFC before 30.4.2005. According to the defendant, the agreement casts an obligation only on the plaintiff to pay balance amount of consideration, it is thereafter that the defendant was to pay by 30.4.2005 the loan owed to HDFC Ltd. and thereafter, the said sale was to be completed. It is further submitted that the defendant had clearly informed the plaintiff that the property is mortgaged to HDFC Bank and therefore, unless the defendant receives money

from the plaintiff to make payment to HDFC Bank he is not in a position to get No Objection Certificate. According to the learned Counsel, therefore, there was an obligation on the plaintiff to pay balance amount of consideration by 30.4.2005. It is further submitted that the defendant had made an offer to the plaintiff to pay about Rs.43,00,000/- to the defendant so that the defendant can make payment to HDFC and get N.O.C. and then to pay balance amount of about Rs.38,00,000/-. According to the learned Counsel appearing for defendant the terms of the agreement on the basis of which the present suit has been filed are not absolutely clear. According to the learned Counsel, it is not clear that whether the defendant was under an obligation to execute the sale deed by 30.4.2005. According to the learned Counsel therefore, as the terms of the agreement are not clear the defendant is entitled to leave to defend the suit. In support of his submission he relies on the judgment of the Supreme Court in the case of “Mrs.Raj Duggal Vs. Ramesh Kumar Bansal, AIR 1990 Supreme Court 2218”.

3. In the light of these rival submissions if the record of the case is perused, it is clear that there is no dispute that there is an agreement dated 30.3.2005 entered into between the parties which is signed by both the parties. There is no dispute between the parties that the flat for the sale of which the agreement was entered into was owned by the defendant and he had mortgaged it to HDFC Bank. There is also no dispute between the parties that on the date of agreement an amount of Rs.5,00,000/- was paid by the plaintiff to the defendant. There is no dispute between the parties that on 30.4.2005 the plaintiff did not make payment of the balance amount to the defendant. The entire controversy between the parties is that whether on plaintiff making payment on or before 30.4.2005 the plaintiff was entitled to have the transfer deed executed in her favour by the defendant on that date. The dispute is that whether on the date on which the plaintiff was to make payment of balance amount of consideration, the title of the defendant was to be clear. Now in the light of this position, if the agreement is perused it becomes clear that the property was admittedly mortgaged to

HDFC Bank. There is no dispute between the parties that unless and until the dues of HDFC Bank are cleared the defendant would not have been in a position to transfer the property and by the agreement there is an obligation cast on the plaintiff to pay balance amount of consideration by 30.4.2005. In my opinion, from these admitted facts and the terms of the agreement, the only inference that can be drawn is that on the date on which the plaintiff makes payment of the balance amount of consideration, the defendant must have clear title which he could transfer to the plaintiff. There can be no justification for the plaintiff to pay full amount of consideration keeping nothing back knowing fully well that the defendant's title of the flat is not clear. In my opinion, therefore, the stand taken by the defendant that the plaintiff should pay him full amount of consideration though he has not cleared his title, is unreasonable and incapable of being accepted on the basis of the terms of the contract between the parties. Had it been the intention of the parties that the plaintiff was to make payment to the defendant so that the defendant

could get his title cleared from HDFC Bank as the outstanding amount to the HDFC was Rs.43,00,000/-, the parties would have made provision to that effect in the agreement. They would have included the term that the plaintiff will pay either directly to HDFC Bank or to the defendant so that he could clear the dues of HDFC Bank at a prior point of time. But no such term was included in the agreement, which shows that there was an obligation on the defendant to get his title cleared before 30.4.2005 so that he becomes entitled to receive full amount of consideration from the plaintiff. It is further pertinent to note here that on 29.4.2005 the plaintiff addressed a letter to the defendant pointing out that she is ready with the balance amount of consideration. It is further stated that she is willing to make payment of Rs.43,00,000/- so that title of the defendant could be cleared. There is no dispute that the defendant does not deny that he received letter dated 29.4.2005 but that letter is not replied. It is thus clear that so far as refund of earnest money is concerned, the defendant has no defence to offer. In this view of the matter therefore, in my opinion, the defendant is

not entitled to any leave to defend the suit. As the defendant is not entitled to leave to defend the suit, the plaintiff becomes entitled to a decree. Therefore, the summons for judgment is granted. The suit of the plaintiff is decreed in terms of prayer clause of the suit. No order as to costs.

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